PD-0578-16
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 7/27/2017 11:20 PM
Accepted 7/31/2017 4:22 PM
DEANA WILLIAMSON
CLERK

NO. PD-0578-16

FILED
COURT OF CRIMINAL APPEALS
7/31/2017
DEANA WILLIAMSON, CLERK

IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF TEXAS

EX PARTE
ADAM WAYNE INGRAM,
Appellant

ON APPEAL FROM THE FOURTH COURT OF APPEALS, SAN ANTONIO

NO. 04-15-00459-CR

APPELLANT'S MOTION FOR REHEARING

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TO THE HONORABLE COURT OF CRIMINAL APPEALS OF TEXAS:

COMES NOW ADAM WAYNE INGRAM, Appellant, by and through his undersigned Counsel Donald H. Flanary, III., and pursuant to Texas Rule of Appellate Procedure Rule 79.1, moves the Court to set aside the judgment of affirmance rendered and entered herein on the 28th of June, 2017, and grant a rehearing of this cause. In support thereof, Appellant would respectfully show as follows:

GROUNDS FOR REHEARING

1. The Majority Opinion fails to address the Appellant's vagueness challenge. Appellant requests rehearing in order that the Court will full address all issues raised in his Petition.
2. The Majority Opinion mischaracterizes subsections (d)(2) and (d)(3) of Texas Penal Code § 33.021 as "anti-defensive issues" when those subsections only serve to further define the elements of § 33.021(c).
3. The Majority Opinion's rationale of non-cognizability taken with this Court's ruling in *Karenev* bars any attempt to raise the Appellant's facial challenge to the statute.
4. The Majority Opinion mistakenly presumes that the disputed provisions of § 33.021(d) were severable.

ARGUMENT

Ground 1.

The Majority Opinion does not address the Appellant's vagueness challenge. The Majority Opinion only addresses (1) the cognizability of pre-trial habeas, (2) issues of the unconstitutional overbreadth of the statute, and (3) issues of Dormant Commerce Clause jurisprudence. *See Ex parte Ingram*, PD-0578-16, 2017 WL

2799980, at *1 (Tex. Crim. App. June 28, 2017). While the Majority Opinion states, "[w]e conclude that appellant's claims that revolve around the anti-defensive issues—the *mens rea*, right to present a defense, and vagueness claims—are not cognizable on pretrial habeas," anti-defensive issues have no bearing on vagueness claims. *Id.* at *4.

As pointed out by Judge Alcala's Concurrence, "a statute is void for vagueness if its prohibitions are not clearly defined." *Id.* at *14 (Alcala, J., concurring) (quoting *State v. Holcombe*, 187 S.W.3d 496, 499 (Tex. Crim. App. 2006). Any hypothetical facts or evidence of "anti-defensive issues" developed on the record at trial have no relevance, bearing, or effect on the plain language of the challenged statute or the interpretation therein. No facts are needed for a vagueness challenge under any circumstances. The questions will always be: (1) is a person of ordinary intelligence given a reasonable opportunity to know what is prohibited, (2) does the law establish determinate guidelines for law enforcement, and (3) if First Amendment freedoms are implicated, is the law sufficiently definite to avoid chilling protected expression. *See Long v. State*, 931 S.W.2d 285, 287 (Tex. Crim. App. 1996).

Because so called "anti-defensive issues" have no bearing on vagueness challenges, the Majority Opinion's non-cognizability logic on this issue fails. Since

facts concerning "anti-defensive issues" are not needed to address a vagueness challenge, then interlocutory review through pretrial habeas is available because the resolution of this claim will not be aided by the development of a record at trial. No trial record will ever be needed.

Since pretrial habeas is available and the vagueness claim is in fact cognizable, this Court must grant rehearing to review and render a decision on Appellant's vagueness claim.

Ground 2.

Characterizing the disputed provisions as "anti-defensive" issues is misplaced and without precedent. Subsections (d)(2) and (d)(3) of Texas Penal Code § 33.021, which proscribe a potential defense, serve to refine or further define the essential elements of an offense and, as such, cannot be so easily severed in review of a facial challenge because of issues concerning notice. *See Ex parte Ellis*, 309 S.W.3d 71, 79 (Tex. Crim. App. 2010). This is exactly why defensive issues have been acknowledged in past writs. *See Long*, 931 S.W.2d at 294-95 (discussing affirmative defenses); *see also Faust v. State*, 491 S.W.3d 733, 767 (Tex. Crim. App. 2015) (Newell, J., dissenting) (discussing defenses and notice).

The fact that an "anti-defensive" provision broadens the scope of the proscribed offense, as compared to narrowing it when a specific defense is listed in

a statute, is inapposite to the issue of vagueness. *Ingram*, 2017 WL 2799980, at *14 (Alcala, J., concurring) (citing *Holcombe*, 187 S.W.3d at 499). In other words, it goes to the issue of how a statute will be read by the defendant after he has been provided sufficient notice of the offense for which he is charged. This is why the fundamental concept of notice in charging instruments requires the state to track the language of the statute. *See* U.S. Const. amend. VI; Tex. Const. art. 1, § 10; *Id.* art. V, § 12(b); TEX. CODE CRIM. PROC. ART. 21.11; *State v. Moff*, 154 S.W.3d 599, 601 (Tex. Crim. App. 2004); *Ferguson v. State*, 622 S.W.2d 846, 849–50 (Tex. Crim. App. 1981) (opinion on reh'g). Vagueness challenges likewise require the Court to review whether the "prohibitions are clearly defined." *Holcombe*, 187 S.W.3d at 499.

The further characterization of the provisions as "freestanding" because "they are not attached to a defensive issue" ignores the fact that the "defenses" these provisions prohibit are not the same "defenses" defined in § 2.03 of the Texas Penal Code. The defense as used under the disputed provisions of 33.021(c) prohibits a defendant from asserting that his intent was not to engage in the proscribed conduct. Insofar as this is the case, the "anti-defensive issue" is tied directly to the elements of the offense. This statute specifically broadens the scope of intent to include intents to do something else. The fact that this further definition of that element comes under a separately labeled provision does not affect how the

provision will guide a defendant's decisions in the case. The purpose of the provision by its plain language serves to notify defendants not to attempt to defend on the grounds proscribed. If the provision was not there, those defenses would be natural negations of the element of intent.

Ground 3.

The Court's Majority Opinion is unworkable. Substantively, a pretrial writ of habeas corpus challenging the facial constitutionality of a statute is essentially the same thing as a motion to dismiss or quash for facially unconstitutional statute with the exception that a pretrial writ can be appealed interlocutorialy.

If the Appellant were to go back to the trial court and hereafter file a motion to dismiss or quash for facially unconstitutional statute on the same grounds as raised in his pretrial habeas writ, the trial court would be required to take up the issue on its face and there would be no procedural cognizability bars to the review of his facial constitutional claims. His challenges to the statute would be facial and occur prior to trial and certainly before any "anti-defensive issue" facts were developed. If the trial court denied his motion to dismiss/quash, the Appellant could enter a conditional plea and preserve his right to appeal the denial of the motion, or he could proceed to trial irrespective of any "anti-defensive issues," and if convicted, likewise appeal.

Under this scenario, these very same issues would be before this court, absent any cognizability bars. If that scenario were to occur and review of the constitutionality of § 33.021(c) was allowed, again, as here, there would be no "anti-defensive issues" for the court of appeals or this Court to review precisely because this claim is a facial challenge.

Unfortunately, the Majority Opinion does not make clear if the Court would even allow facial challenges on direct appeal rather than pretrial habeas given its analysis of how it arrives at the non-cognizability issue. Since there would be no substantive difference between the analysis of pretrial habeas versus a motion to dismiss/quash, under the Majority Opinion's logic, these issues cannot be raised pretrial at anytime to include in a motion to dismiss/quash. If this is the case, the Majority Opinion renders no adequate way for a defendant to ever review the statute. If he cannot facially challenge the statute on these grounds prior to trial because he hasn't yet brought before the trial court "anti-defensive issues," and he cannot raise a facial challenge for the first time on appeal because of this Court's ruling in *Karenev,* then the Appellant will be bared from ever raising this facial challenge to the statute. *See Karanev v. State*, 281 S.W.3d 428, 441 (Tex. Crim. App. 2009).

Ground 4.

Finally, the Majority Opinion mistakenly presumes that the disputed provisions of 33.021(d) were severable. The Majority, relying on this presumption, concluded that relief for Appellant would not result in an end to the case and thus would not be cognizable. This presumption is made without any analysis of whether severing the provisions would violate the Separation of Powers Clause of the Texas Constitution. Tex. Const. art. II, § 1. Appellant contends it would result in legislating from the bench in violation of the clause.

In the Alternative, Stay the Proceedings

This Court currently has before it on Petition for Discretionary Review *Ex parte Leax*, PD-051716, which raises similar issues as Appellant. *Leax v. State*, No. 09-14-00452, 2016 WL 1468042 (Tex. App.—Beaumont Apr. 13, 2016, pet. granted) (not designated for publication). He challenges the statute claiming it is unconstitutionally overbroad in violation of the First Amendment. Mr. Leax is before this Court on an appeal from the trial court to the Ninth Court of Appeals. Mr. Leax filed a motion to quash rather than seeking pretrial habeas relief. Presumably, Mr. Leax will not suffer the same procedural bars related to cognizability as the Appellant. While Mr. Leax's Petition for Review focuses primarily on whether Penal Code § 33.021 is a content-based restriction, any considerations of the of First Amendment necessarily implicate overbreadth and

vagueness. For these reasons, should this Court decline to grant rehearing, it should stay this proceeding until the issues in *Leax* are resolved.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Appellant respectfully prays that this Motion for Rehearing be granted, the original opinion be withdrawn and the case be reversed and dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on the 27th day of July, 2017, a true and correct copy of the above and foregoing document was served on Patrick Ballantyne, Assistant Bexar County District Attorney, Bexar County Justice Center, 300 Dolorosa, Suite 5072, San Antonio, Texas 78205 *via* email.

/s/ Donald H. Flanary, III.
Donald H. Flanary, III.